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I - UNITED STATES SUPREME COURT

The conservative majority of the U.S. Supreme Court, including the recent Trump appointee Neil Gorsuch, has delivered several decisions upholding anti-immigrant and anti-labor policies. Further, with the recent resignation of Justice Anthony Kennedy, the Court is likely to become even more conservative as the U.S. Senate prepares to engage in confirmation hearings for the next Trump nominee to the Supreme Court.

During the final week of its 2017-2018 term, the Supreme Court decided *Trump v. Hawaii*.¹ By a 5-4 vote, the Court rejected a challenge to President Trump's September 2017 Presidential Proclamation, referred to as the "travel ban", which restricts immigration to the U.S. by citizens of eight countries, most of which are predominately Muslim. The Court majority relied on the Trump administration's asserted national security justifications for the ruling to hold that the travel ban falls within the president's broad authority under federal immigration law. This authority includes barring noncitizens from coming into the U.S. if the president determines that allowing them to enter "would be detrimental to the interests of the United States."²

The Court held, further, that the travel ban does not violate the Establishment Clause of the First Amendment to the U.S. Constitution, which prohibits government action that favors or disfavors one religion over another. The Court majority held that the travel ban was not based on animus towards Muslims, but is "facially neutral toward religion"³ and "is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices."⁴

In her dissenting opinion, Justice Sotomayor charged that the Court had "fail[ed] to safeguard" "the principle of religious neutrality" embedded in the First Amendment by upholding the discriminatory travel ban that "now masquerades behind a façade of national-security concerns."⁵ Providing a detailed account of the many anti-Muslim public statements made by Trump as candidate and as president, the dissenting opinion concludes that "the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers."⁶ The dissent accuses the Court majority of "turning a blind eye to the pain and suffering

1 138 S.Ct. 2392 (2018).

2 *Id.* at 2403.

3 *Id.* at 2418.

4 *Id.* at 2421.

5 *Id.* at 2434 (joined by Justice Ginsburg). Justice Breyer, joined by Justice Kagan, filed a separate dissenting opinion.

6 *Id.* at 2435-40.

the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens.”⁷ The dissent notes, as well, the harmful impact of the travel ban on the U.S. “**higher education system**; national security; healthcare; artistic culture; and the nation’s technology industry and overall economy.”⁸

On the final day of its 2017-2018 term, the Court issued its 5-4 decision in *Janus v. AFSCME, Council 31*,⁹ holding that it is unconstitutional for public sector employers to include agency shop fee clauses in collective bargaining agreements. Under agency shop fee clauses, since all employees represented by a union benefit from collective bargaining, they are required to pay their “fair share” of union dues even if they are not union members. The Court overruled its 40-year precedent in *Abood v. Detroit Board of Education*,¹⁰ which held that agency shop clauses do not violate nonunion member employees’ First Amendment rights of association since they are required to pay only the amount of union dues germane to collective bargaining or contract enforcement.

This system had been applied in more than twenty states and across thousands of labor agreements covering millions of public employees.¹¹ The majority decision in *Janus* concluded that agency fee clauses “violate[] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.”¹² *Janus* applies only to public sector employment and thus does not affect private collective bargaining agreement agency fee provisions, which are permitted by the National Labor Relations Act (NLRA).¹³

The four dissenting justices¹⁴ in *Janus* would have reaffirmed the constitutionality of public sector agency fees under *Abood*. The dissent reveals the Court’s misapplication of the First Amendment to reach a political decision that “prevents the American people, acting through their state and local officials, from making important choices about workplace governance.”¹⁵ As the dissent explains, “The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.”¹⁶

7 *Id.* at 2433.

8 *Id.* at 2446.

9 138 S. Ct. 2448 (2018).

10 431 U.S. 209 (1977).

11 138 S.Ct. at 2487 (dissenting opinion).

12 *Id.* at 2460.

13 29 U.S.C. §§ 151, 158 (a) (3).

14 Justice Kagan wrote the dissenting opinion, joined by Justices Ginsburg, Breyer, and Sotomayor.

15 *Id.* at 2501.

16 *Id.* at 2502.

In another decision undermining labor rights, *Epic Systems Corp. v. Lewis*,¹⁷ the Supreme Court upheld the validity of mandatory individual arbitration agreements in non-union workplaces that require employees to waive the right to bring class or collective actions against the employer, in either court or arbitration. In a 5-4 decision, the Court rejected the National Labor Relations Board's position that such agreements violate employees' rights under the NLRA to engage in concerted activity for mutual aid and protection. The Court held that the class action waivers are consistent with Supreme Court precedent upholding the validity of mandatory employment arbitration agreements under the Federal Arbitration Act. As one commentator has observed, "the decision was a huge victory for employers, because it could significantly reduce the number of claims against them."¹⁸

The four dissenting justices¹⁹ described the majority's decision in *Epic Systems* as "egregiously wrong" in re-creating "the extreme imbalance" between employers and employees.²⁰ The dissent predicts that the Court's decision will lead to "the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers,"²¹ because the expenses of bringing an individual claim will likely exceed the potential recovery and further, individual employees will often fear retaliation for bringing claims.²²

II - NATIONAL LABOR RELATIONS BOARD

Three of the five members of the National Labor Relations Board (NLRB) have been appointed by President Trump and confirmed by the U.S. Senate, resulting in an extremely conservative majority on the NLRB. The Board, under the Trump administration, has overruled important cases that had been decided by the NLRB under the Obama administration.

In *PCC Structurals, Inc.*,²³ the NLRB overruled *Specialty Healthcare Rehabilitation Center of Mobile*,²⁴ which had upheld unions' petitions for small sized bargaining units of employees unless the employer proved that additional employees should be included due to their "overwhelming community of interest" with the bargaining unit employees. Under *PCC Structurals, Inc.*, only the general "community of interest" standard will be used to evaluate the employer's argument that the bargaining unit should be larger.

In *The Boeing Company*,²⁵ the NLRB adopted a standard that increases deference to employer business justifications for adopting workplace rules, policies and employee

17 138 S. Ct. 1612 (2018). This case was consolidated with two other cases raising the same issue, *Ernst & Young LLP v. Morris*, and *NLRB v. Murphy Oil USA, Inc.*

18 Amy Howe, *Opinion analysis: Employers prevail in arbitration case (Updated)*, SCOTUSblog (May. 21, 2018, 11:35 AM), <http://www.scotusblog.com/2018/05/opinion-analysis-employers-prevail-in-arbitration-case/>

19 Justice Ginsburg wrote the dissenting opinion, joined by Justices Breyer, Sotomayor, and Kagan.

20 138 S.Ct. at 1633.

21 *Id.* at 1646.

22 *Id.* at 1647.

23 365 NLRB No. 160 (2017).

24 357 NLRB 934 (2011).

25 365 NLRB n°154 (2017).

handbook provisions that restrict employees' speech at the workplace and on social media, including rules requiring employees to meet standards of "civility." As the dissenting opinion stated in its criticism of the Board's new standard, "Overly protective of employer interests and under protective of employee rights, the majority's standard gives employers the green light to maintain rules that chill employees in the exercise of rights guaranteed by the National Labor Relations Act."²⁶

26 *Id.* at 56 (Board member Pearce, dissenting in part).